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Public Prosecutor v Kamarul Azamin bin Mohamad

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HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL CASE NO WA-42JSKH-1–01 OF 2019
ASLAM ZAINUDDIN JC
26 AUGUST 2020

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused was found guilty by sessions court for offence of inciting a child to an act of gross indecency under s 377E of the Penal Code — Sessions court gave eight years imprisonment and one stroke of rotan — Prosecution appealed against inadequacy of sentence — Accused appealed against conviction and sentence — Whether accused should be found guilty for offence of gross indecency or outrage of modesty — Whether sentence was adequate — Penal Code ss 354 and 377E

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This was an appeal by both the public prosecutor and the accused person against the decision to find the accused guilty on an amended charge by the High Court under s 354 of the Penal Code ('the Code') instead of the original charge in the court below. It was done under the provision of s 316(b)(ii) of the Criminal Procedure Code. The accused was originally tried and found guilty on two charges under s 377E of the Code which is an offence of inciting a child to an act of gross indecency. The learned sessions court judge ('SCJ') found the accused guilty on both the charges and sentenced him to eight years imprisonment and one stroke of the rotan for each of the charges which were ordered to run concurrently. Both the prosecution and the accused appealed to the High Court. The prosecution appealed against the inadequacy or exiguousness of the sentence whereas the accused appealed against both conviction and sentence. The accused was allegedly committing an offence of inciting a child to an act of gross indecency by touching the victim's private part. The accused also forced the victim to touch his private part. The incident was reported to the school's principal by the complainant, the victim's mother. The school administration then established a committee to investigate the complaint but there was no development of the investigation. A police report was made against the accused and the accused was arrested and charged for the offence of inciting a child to an act of gross indecency under s 377E of the Code.

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Held:

(1) For an offence under s 377E of the Code, the accused person must have committed an act which was short of rape or sodomy *id est* there was no penetration done on the victim. The accused put his hand on the

membrum virile of the victim and made the victim do the same to him while both of them were fully clothed. It did not amount to gross indecency but amounted to outraging of modesty. It must be proven that the accused assaulted or used criminal force on the victim and that he intended thereby to outrage the victim's modesty; or that he knew it to be likely that he would thereby outrage victim's modesty. The appropriate provision of the law applicable was s 354 of the Code and it was found that the accused guilty thereunder (see paras 9 & 15–16).

(2) The learned SCJ in her judgment misdirected herself when she took into account the findings of the internal investigation by the school into the allegations against the accused where it was alleged that the accused had been found to have committed similar acts in the past. The learned SCJ should not have allowed the school's internal findings to colour her judgment when it came to sentencing the accused. It was clearly prejudicial to the accused as the internal investigation was not done according to the requirements of a criminal trial. With regard to the punishment that was meted out to the accused in the case, looking at the facts in the case and the mitigation put forth by counsel for the accused, and the fact that it was the accused person's first offence, a fine of ten thousand ringgit for each charge would be sufficient (see paras 17–18 & 20).

[Bahasa Malaysia summary

Ini adalah rayuan oleh kedua-dua pendakwa raya dan tertuduh terhadap keputusan yang mendapati tertuduh bersalah atas tuduhan yang telah dipinda oleh Mahkamah Tinggi di bawah s 354 Kanun Keseksaan ('Kanun tersebut') dan bukannya pertuduhan asal di mahkamah perbicaraan. Ia telah dilakukan di bawah peruntukan s 316(b)(ii) Kanun Tatacara Jenayah. Tertuduh pada asalnya dibicarakan dan didapati bersalah atas dua pertuduhan di bawah s 377E Kanun tersebut yang merupakan kesalahan menghasut kanak-kanak ke atas perbuatan tidak senonoh. Hakim mahkamah sesyen ('HMS') mendapati tertuduh bersalah atas kedua-dua tuduhan tersebut dan menjatuhkan hukuman penjara lapan tahun dan satu kali hukuman rotan untuk setiap pertuduhan yang diperintahkan untuk dijalankan serentak. Kedua-dua pihak pendakwaan dan tertuduh membuat rayuan ke Mahkamah Tinggi. Pihak pendakwaan mengemukakan rayuan terhadap ketidakcukupan hukuman itu sedangkan tertuduh mengemukakan rayuan terhadap sabitan dan hukuman. Tertuduh didakwa melakukan kesalahan menghasut seorang kanak-kanak untuk melakukan perbuatan tidak senonoh dengan menyentuh bahagian sulit mangsa. Tertuduh juga memaksa mangsa menyentuh bahagian sulitnya. Kejadian dilaporkan kepada pengetua sekolah oleh pengadu yang merupakan ibu mangsa. Pentadbiran sekolah kemudian menubuhkan sebuah jawatankuasa untuk menyiasat aduan tersebut tetapi tidak ada perkembangan siasatan. Laporan polis telah dibuat terhadap tertuduh dan tertuduh ditangkap

dan didakwa atas kesalahan menghasut kanak-kanak ke atas perbuatan tidak senonoh di bawah s 377E Kanun tersebut. A

Diputuskan:

(1) Untuk kesalahan di bawah s 377E Kanun tersebut, tertuduh mesti melakukan perbuatan yang kurang daripada perbuatan rogol atau liwat iaitu tidak ada penetrasi yang dilakukan terhadap mangsa. Tertuduh meletakkan tangannya pada *membrum virile* mangsa dan membuat mangsa melakukan perkara yang sama kepadanya ketika mereka berdua berpakaian lengkap. Itu tidak sama dengan kelucahan melampau, tetapi sama dengan mencabul kehormatan. Perlu dibuktikan bahawa tertuduh menyerang atau menggunakan kekerasan terhadap mangsa dan bahawa tertuduh berniat untuk mencabul kehormatan mangsa; atau bahawa dia tahu kemungkinan dia akan mencabul kehormatan mangsa. Peruntukan undang-undang yang sesuai yang terpakai adalah s 354 Kanun tersebut dan didapati bahawa tertuduh bersalah di bawah peruntukan tersebut (lihat perenggan 9 & 15–16). B C D

(2) HMS dalam penghakimannya telah terkhilaf apablia beliau mengguna pakai penyiasatan dalaman oleh sekolah terhadap dakwaan terhadap tertuduh di mana didapati tertuduh telah didapati melakukan perbuatan serupa pada masa lalu. HMS tidak sepatutnya membenarkan penemuan penyiasatan dalaman sekolah mempengaruhi penilaiannya ketika menjatuhkan hukuman terhadap tertuduh. Ini jelas memberi prejudis terhadap tertuduh kerana siasatan dalaman tidak dilakukan mengikut keperluan perbicaraan jenayah. Berkenaan dengan hukuman yang dijatuhkan kepada tertuduh dalam kes tersebut, melihat fakta dalam kes tersebut dan mitigasi yang dikemukakan oleh peguam bagi tertuduh, dan fakta bahawa itu adalah kesalahan pertama tertuduh, denda sepuluh ribu ringgit untuk setiap pertuduhan adalah mencukupi (lihat perenggan 17–18 & 20).] E F G

Cases referred to

Kassim bin Utus v PP [2005] 6 MLJ 320; [2005] 7 CLJ 273, HC (refd)
Manokaran & Anor v PP [1979] 1 MLJ 262 (refd)
Mohamad Izzaini bin Zainudin v PP [2019] 7 MLJ 366; [2018] 1 LNS 1351, HC (refd) H
Mohd Khairul Hisam Azis v PP [2019] 1 LNS 455, HC (refd)
PP v Azri Othman [2017] 1 LNS 1618, HC (refd)
Zaini bin Hussin v PP and another appeal [2020] 10 MLJ 165; [2019] 1 LNS 2144, HC (refd) I

Legislation referred to

Criminal Procedure Code s 316(b)(ii)
Penal Code ss 148, 349, 354, 377E

Aimi Syazwani bt Sarmin (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Mohd Taqiyuddin bin Yahya (Taqiyuddin & Partners) for the respondent.

Aslam Zainuddin JC:

[1] This is an appeal by both the public prosecutor and the accused person against my decision to find the accused guilty on an amended charge by the High Court under s 354 of the Penal Code ('the Code') instead of the original charge in the court below. This was done under the provision of s 316(b)(ii) of the Criminal Procedure Code. The accused was originally tried and found guilty on two charges under s 377E of the Code which is an offence of inciting a child to an act of gross indecency. The learned sessions court judge ('SCJ') found the accused guilty on both the charges and sentenced him to eight years imprisonment and one stroke of the rotan for each of the charges which were ordered to run concurrently. Both the prosecution and the accused appealed to the High Court. The prosecution appealed against the inadequacy or exiguousness of the sentence whereas the accused appealed against both conviction and sentence.

[2] The facts of the case as can be gleaned from the judgment of the learned SCJ at p 14 onwards of the appeal record *Jld* 1 is as follows:

> Secara ringkasnya kes pendakwaan adalah seperti berikut: Pengadu ('SP1') dalam kes ini merupakan ibu mangsa. Pada 5.5.2016 jam lebih kurang 10 malam, semasa SP1 berada di dalam rumah, mangsa ('SP9') telah mengadu kepadanya bahawa SP9 tidak suka kepada salah seorang guru di sekolah yang dikenali sebagai Cikgu Kamarul ('OKT'). SP9 memberitahu dia tidak suka OKT kerana 'gay'.
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> SP9 telah memaklumkan kepada SP1, OKT adalah guru Matematik kelas 5 Tekun dan OKT telah melakukan perkara yang tidak elok kepadanya. SP9 menyatakan OKT ada bertanya soalan sama ada SP9 pernah mendengar perkataan melangcang tetapi SP1 telah memperbetulkan perkataan adalah melancap. SP9 seterusnya menceritakan OKT telah mengambil tangannya dan diletakkan ke kemaluan OKT dan OKT ada menyatakan kepada SP9 jika kemaluan keras tolakkan ke tepi. SP1 telah meminta SP9 pergi ke sekolah seperti biasa dan SP1 akan ke sekolah untuk memaklumkan pihak sekolah kejadian yang berlaku.
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> SP1 bersama-sama dengan bapa mangsa ('SP2') telah pergi ke sekolah pada 6.5.2016 dan telah berjumpa dengan Puan Rosmawati ('SP12') iaitu Guru Penolong Kanan Hal Ehwal Murid untuk membuat aduan mengenai gangguan seksual yang dialami oleh SP9. Aduan telah dinyatakan dalam Borang Aduan Pelanggan ('Eksibit P1'). SP12 mengambil maklum aduan tersebut dan akan membawa perkara ini ke perhatian Pengetua serta siasatan mengenainya akan dilakukan.
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> Pada tarikh 6.5.2016, SP9 telah menceritakan kejadian yang sama telah berlaku ke atasnya semasa SP9 dan rakannya SP11 berada dalam makmal komputer. OKT

telah mengambil tangan SP9 dan meletakkannya ke kemaluan OKT dan memberitahu SP9 agar tidak memberitahu sesiapa mengenai kejadian ini.

SP1 yang kebetulannya masih berada dalam kawasan sekolah semasa diceritakan kejadian ini oleh SP9, telah pergi ke pejabat sekolah semula dan berjumpa dengan SP12 dan Pengetua ('SP13') untuk memaklumkan kejadian terkini yang berlaku.

Akibat dari kejadian ini, SP9 takut dan enggan ke sekolah terutamanya pada hari yang mempunyai pelajaran Matematik walau bagaimanapun SP1 telah menasihati dan meminta SP9 untuk pergi ke sekolah seperti biasa.

Pada 9.5.2016, SP9 telah dipanggil oleh guru kaunseling ('SP8') yang meminta SP9 menceritakan apa yang berlaku di bilik guru dan bilik computer. SP9 telah memberikan penyataan bertulis ('Eksibit P13A') mengenai kejadian yang berlaku. SP8 juga telah memanggil rakan-rakan SP9 bernama SP10 & SP11 untuk memberi penyataan bertulis yang dikemukakan sebagai Eksibit P13B & P13C.

Pihak sekolah telah menubuhkan satu Jawatan Kuasa Siasatan untuk menyiasat kes ini dan keputusan jawatan kuasa adalah untuk membawa perkara ini ke peringkat atasan Jabatan Pendidikan.

Pada 10.5.2016, SP1 telah membuat Laporan Polis TTDI 1310/2016 ('Eksibit P2') apabila tiada perkembangan dan jawapan diterima dari pihak sekolah. Berikutan dari laporan tersebut, satu siasatan yang diketuai oleh pegawai penyiasat ('SP14') telah pergi ke tempat kejadian bersama-sama dengan jurufoto. Gambar-gambar di tempat kejadian ('Eksibit P6A-G') telah diambil.

OKT telah ditangkap pada 12.5.2016 pada jam lebih kurang 12.10 tengahari di Sekolah Rendah Kebangsaan Tun Dr Ismail 2. Satu Laporan Polis TTDI 1322/16 ('Eksibit P5') telah dibuat oleh pegawai tangkapan ('SP3'). OKT kemudiannya telah dipindahkan ke Pejabat Pendidikan Pudu, Bangsar dan tidak dibenarkan untuk mengajar murid di sekolah.

SP9 telah memberi keterangan video di Child Interview Centre ('CIC'). CD dan kandungan CD telah dikemukakan sebagai Eksibit P10 dan P10A manakala transkrip dikemukakan sebagai Eksibit P8.

Dalam kes ini terdapat dua tarikh kejadian iaitu pada 4.5.2016 di bilik guru sekolah dan pada 6.5.2016 kejadian berlaku di bilik komputer sekolah.

Keterangan SP9 mengenai kejadian di bilik guru boleh di dapati di m/s 3–4 transkrip ('Eksibit P8') yang berbunyi:

'Rabu minggu lepas kot, sebab hari Rabu tu Maths pagi-pagi. Ok, masa tu dah habis Maths, waktu sejarah ... dia ajak saya pegi bilik guru untuk ulang kaji depan murid-murid semua. Saya ikut la ... lepas itu, saya duduk sebelah dia, kita orang ulang kaji, lepas tu cikgu cakap Dik, awak tahu tak melancap tu apa? Saya tak tahu, saya diam jela, lepas tu dia cakap benda tu macam lucah-lucah sikit'.

'Pastu kita ulang kaji balik, pastu dia letak tangan dia kat kemaluan saya, dia macam picit-picit ar ... saya tak suka sebab sakit'.

'Dia ambik tangan saya letak kat kemaluan dia. Pastu dia suruh picit ar ... saya tak nak, saya macam tarik tarik la ... pastu dia cakap, dia cakap bagi tips, macam dia

A cakap bila kemaluan kita naik, tolak ke tepi'.

Di m/s 6 transkrip ('Eksibit P8')

'Cikgu buat apa?

Cikgu letak tangan dia kat kemaluan saya ...

B

OK lagi?

Pastu dia amik tangan saya letak kat kemaluan dia ...'

Keterangan SP9 di makmal computer adalah seperti m/s 6

C — 8 transkrip (Eksibit P8):

'Masa tu Jumaat kitorang ada program pagi pagi lagi la ... aktiviti buat aktiviti la ... pastu cikgu datang cakap kat saya aa masa tu hari Israk Mikraj. Kitorang kena kumpul kat dewan, masa tu program pagi, cikgu tu datang kat saya cakap ... '

D 'Pastu dia cakap dengan kawan saya SP11 ni, kena buat Permata Pintar ... pastu Cikgu Kamarul plak ajak saya buat sekali ... masa pukul 8.45 pagi tu, dia ajak saya. Masa tu Ustaz tengah bagi ceramah, masa tu dia panggil ... patutnya SP11 saja kena buat Permata Pintar tu dengan Cikgu Zara, tapi Cikgu Zara suruh Cikgu Kamarul ganti dia, pastu Cikgu Kamarul pun ajak la saya kat bilik komputer ... '

E 'Pastu kitorang duduk jauh-jauh la, takut kitorang meniru, Cikgu Kamarul duduk tepi saya, pastu berlaku benda yang sama la ... apa tu dia letak tangan dia kat kemaluan saya, dia letak ambil tangan saya letak kat kemaluan dia ... pastu masa tu saya sambil buat ujian tu, tangan saya dekat kemaluan dia, pastu saya tak boleh fokus la ... SP11 dia ni lulus, saya tak lulus ... sebab saya tak fokus'.

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Keterangan SP9 di Mahkamah adalah konsisten dengan keterangan video dan dapat dilihat OKT adalah orang yang telah memulakan perlakuan dan mengajak SP9 untuk melakukan perbuatan dengan OKT.

Kes pembelaan

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Pihak pembelaan telah memanggil 5 orang saksi iaitu OKT ('SD1'), Puan Dayang Siti Fatimah ('SD2'), Puan Zarazulaily ('SD3'), Puan Faratul Syeeda (SD4) dan Puan Julia Chee (SD5). SD2 hingga SD5 adalah guru-guru yang bertugas di SRK Tun Dr Ismail 2, Kuala Lumpur.

H Dari keterangan OKT, OKT menafikan kejadian yang berlaku tetapi mengakui pada tarikh dan waktu tersebut, OKT berada di tempat kejadian seperti dalam pertuduhan-pertuduhan. Pembelaan OKT adalah pada waktu-waktu kejadian tersebut, OKT hanya membantu SP9 mengulangkaji pelajaran Matematik di bilik guru dan membantu SP9 dan SP11 menduduki ujian Permata Pintar di bilik komputer.

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OKT menafikan kejadian berlaku di bilik guru kerana terdapat lebih kurang 10 orang guru berada di bilik guru pada waktu 8.00 hingga 10.00 pagi. Keadaan bilk guru sentiasa terbuka dan guru-guru bebas keluar dan masuk bilik tersebut. Kedudukan meja OKT terletak di laluan orang dan adalah sukar untuk melakukan perbuatan seperti dalam pertuduhan.

OKT telah memanggil seramai 4 orang guru sekolah yang dikatakan berada di bilik guru pada waktu pagi tersebut. Keterangan mereka sekadar untuk mengesahkan bahawa pada tarikh dan waktu berkenaan OKT dan SP9 sememangnya berada di situ. Kedudukan tempat duduk SD2, SD3, SD4 & SD5 dikatakan berdekatan dengan tempat duduk OKT dan dapat melihat apa yang dilakukan oleh OKT ketika itu. SD2, SD3, SD4 & SD5 juga memaklumkan bahawa mereka tidak mendengar sebarang kekecohan atau jeritan dari SP9 semasa sesi ulangkaji berlangsung. Tiada sebarang keterangan dari SD2, SD3, SD4 & SD5 mengenai kejadian di bilik komputer.

[3] The relevant law in this matter is s 377E of the Code which states:

377E Inciting a child to an act of gross indecency

Any person who incites a child under the age of fourteen years to any act of gross indecency with him or another person shall be punished with imprisonment for a term of not less than three years and not more than fifteen years, and shall also be punished with whipping.

WHAT AMOUNTS TO 'GROSS INDECENCY'

Looking at the cases relating to the offence of gross indecency, it can be said that the offence requires an act which falls short of penetration by the accused. This is because the term gross indecency is not defined in the Code. Therefore, it is helpful to look at the case law on s 377E of the Code to see what amounts to gross indecency eventhough the facts of the cases which I have referred to below make for indecorous, salacious, and risque reading.

[4] In the case of *Mohd Khairul Hisam Azis v Public Prosecutor* [2019] 1 LNS 455 it was stated by YA Collin L Sequerah J:

The facts of the case in brief was that the three complainants, namely, SP1, SP2 and SP3 were all remanded at the Juvenile Central Lock-up Jinjang ('lock up') for investigations concerning a case under s 148 of the Penal Code for possessing weapons or missiles at riot or 'kes rusuhan'.

While SP1 was remanded on 7 April 2016 and placed in cell no LG04, SP2 and SP3 were remanded on 8 April 2016 and placed in cell no LG03. The gist of the evidence given by all the complainants was that on 10 April 2016, the appellant, who was on duty, had opened the cells and asked each of the complainants to come out of their cells at different times.

On each occasion, the appellant would hand over a broom to the complainants and in the case of SP1 and SP2 they were instructed to sweep the area near the cells. After that he would direct the complainants to go to the water faucet room or 'bilik pili air'. While there, the appellant would fondle the complainant's private parts.

In the case of SP1, the appellant performed fellatio on him that eventually resulted in the emission of semen into the appellant's mouth. In the case of SP2, the appellant tried to perform fellatio on him but this was resisted to by SP2 after which the appellant fondled his private parts. In the case of SP3, although the appellant

fondled him, there appeared to be no reaction or stimulation on the part of SP3 and so the appellant then took him back to his cell.

[5] In the case of *Zaini bin Hussin v Public Prosecutor and another appeal* [2020] 10 MLJ 165; [2019] 1 LNS 2144 YA Alwi Hj Abdul Wahab J said:

> The first appeal involves a child victim aged 11 years who testified against the appellant for inciting him to an act of gross indecency, an offence under s 377E of the Penal Code. The charge against the appellant as amended is as follows:
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> 'Bahawa kamu, pada sekitar Oktober 2016, jam lebih kurang 12.00 malam, bertempat di rumah tidak bernombor Kampung Hujung Airport Semporna, di dalam Daerah Semporna, di dalam Negeri Sabah, telah merangsang seorang kanak-kanak bernama AAMABD (MYKAD: XXX) untuk melakukan suatu perbuatan kelucahan melampau, yang mana kamu telah menggesel-gesel kemaluan kamu dengan kemaluan mangsa bernama AAMABD (MYKAD: XXX), dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 377E Kanun Keseksaan.
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> The child victim who gave sworn evidence as PW1 had earlier on lodged a police report exh P2 dated 15 December 2016 stating that he was sodomised by the appellant at the appellant's house sometime in October 2016 at 12.00pm. The appellant is an Ustaz teaching at Sekolah Agama Tun Sakaran, Semporna, Sabah.
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> Due to the importance of exh P2 which has some bearing in the determination of this case, its contents is reproduced in verbatim:
>
> PADA BULAN OKTOBER 2016 LEBIH KURANG JAM 12.00 MALAM BERTEMPAT DI RUMAH JALAN AIRPORT LAMA SEMPORNA SEMASA SAYA SEDANG BARING DI BILIK USTAZ ZAINI TIBA-TIBA USTAZ ZAINI DATANG DAN BARING DI BELAKANG SAYA DAN MEMBUKA SELUAR SAYA LALU MEMASUKKAN KEMALUANNYA KEDALAM DUBUR SAYA. SAYA TIDAK DAPAT BERBUAT APA-APA KERANA TAKUT DIMARAHI OLEH USTAZ ZAINI. KEJADIAN SEBEGINI SUDAH BANYAK KALI BERLAKU DAN USTAZ ZAINI JUGA ADA MENGUGUT MAHU MEMBUNUH SEKIRANYA SAYA MEMAKLUMKAN PERKARA INI KEPADA ORANG TUA SAYA. SAYA TAMPIL KE BALAI POLIS MEMBUAT LAPORAN MAKLUMAN DAN TINDAKAN SELANJUTNYA. SEKAIN LAPORAN SAYA.
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> Acting on the above police report exh P2 by PW1, Inspector Hasdiyanti bt Kasdi ie the investigating officer of the case ('PW4') had commenced the investigations into the alleged complaint. The next day, she brought PW1 to Tawau Hospital for medical check-up and examination by the medical officer.
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> From the evidence of PW1 and PW4, both testified that upon the examination by the medical officer, there was no tear detected on PW1's anus which suggests that there was no penetration to constitute an act of sodomy, the reason why the appellant was not charged for sodomy but for inciting a child victim to an act of gross indecency instead.
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> In the present case, there was no eye witness and the only evidence adduced by the prosecution was through PW1 who alleged that the appellant had inciting an act of

gross indecency as described in the charge departing from the original complaint made by PW1 in his police report exh P2.

[6] In the case of *Mohamad Izzaini bin Zainudin v Public Prosecutor* [2019] 7 MLJ 366; [2018] 1 LNS 1351 YA Abdul Wahab Mohamed JC (as His Lordship then was) stated the following:

> The appellant was the stepfather to the victim ('PW3'), an eight-year-old child at the time of incident. During the first incident, PW3 had returned home after school morning session. Upon reaching home, PW3 put on a towel to take a shower. At the material time, the appellant whom PW3 referred to as 'papa' had reached home and had entered the house using his own key. The appellant had then called PW3 into his room. Upon entering the room, PW3 saw the appellant sitting at the side of the bed wearing only towel. The appellant proceeded to unwrap his towel and ordered PW3 to unwrap her towel. PW3 refused to do so but was pulled by the appellant and her towel came undone and fell. The appellant ordered PW3 to suck his penis but PW3 refused to do so. The appellant proceeded to pull PW3's head towards his penis and ordered PW3 to suck his penis. PW3 opened her mouth but did not touch the appellant's penis. The appellant ordered PW3 to close her mouth while his penis was in her mouth. The appellant pushed PW3's head to enable his penis to enter her mouth. Subsequently, the appellant rubbed his penis using his own hands until a white slimy liquid was produced. The appellant ordered PW3 to touch the said liquid but PW3 refused to do so. The appellant then pulled PW3's hand and ordered her to touch the said liquid causing her to touch it. The appellant then ordered PW3 to take a shower. The appellant forbade PW3 from telling anyone about the said incident. PW3 just kept silent and went straight to the shower. The appellant took a shower after PW3 did and left the house leaving PW3 at home alone.
>
> About a day or two after the first incident, similar incident occurred again for the second time. At around 1pm after PW3 returned home from school and about to take a shower, PW3 who was in her towel was called by the appellant who was already in his towel at the material time. The appellant had ordered PW3 to suck his penis but PW3 refused to do so. The appellant pulled PW3's head forward until PW3 suck his penis. Subsequently, the appellant ejaculated and had ordered PW3 to touch his semen. The appellant then ordered PW3 to take a shower. PW3 did not tell anyone about the said incident.
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> At the third incident, the appellant had ordered PW3 to suck his penis. Having ejaculated, he ordered PW3 to touch his semen but PW3 refused to do so. The appellant took action in inserting his penis into PW3's vagina. The appellant was lying down while PW3 was standing in front of the appellant. The appellant ordered the victim to come close to the appellant's penis. The appellant got up slightly with part of his body on the bed and part of his body off the bed. PW3 informed that the appellant's penis penetrated a little and that PW3 felt a slight pain. PW3 saw the appellant's penis at the material time.

[7] In the case of *Public Prosecutor v Azri Othman* [2017] 1 LNS 1618 YA Chan Jit Li JC (as Her Ladyship then was) stated the following:

It will be relevant to set out the brief facts of the case before I proceed to determine the issues. They are as follows. The child's parents are working parents. Whilst they are at work, the child is sent to a baby sitter known as one Puan Umrah. The accused is Puan Umrah's husband and the crime was alleged to have been committed whilst the child was at the baby sitter's house.

The incident came to light when the child related the incident to his mother one Puan Azlina bt Zainal Abidin ('PW8'). According to PW8, the child was under Puan Umrah's care since the age of four years. On 14 September 2012, the child complained to her of the accused's misconduct. She said:

MHSSA beritahu tidak mahu ke rumah pengasuh dan tidak dibenarkan untuk pergi ke rumah pengasuh oleh suami pengasuh. Saya ada tanya dia selepas insiden yang dia cium pipit tu apa lagi perbuatan atau kelakuan yang dilakukan oleh beliau. Setelah beberapa hari MHSSA memberitahu saya bahawa OKT ada melakukan sesuatu pada kemaluan. Yang anak saya selalu panggil sebagai *bird*. Anak saya bagi tahu OKT melondeh seluarnya dan bermain kemaluannya. Anak saya tunjuk contoh kelakuan tersebut. Anak saya memegang pergelangan tangan saya sambil menggosok-gosok tangan saya dan bagi tahu yang Pak Cik gosok *bird-bird* dia macam ini. Dan ada ketika pakcik hisap *bird-bird*nya. Saya tanya kenapa MHSSA tak bagi tahu mama selama ini? MHSSA bagi tau pakcik ugut dia untuk tampar muka dia kalau MHSSA bagitau pada mama dan ayah. Saya tanya berapa kali pakcik buat benda ini kat MHSSA. Anak saya kata banyak kali. Anak saya tidak tahu angka jadi dia kata beratus ribu kali mama. Maksud dia macam banyak kali dah berlaku.

(p 155 and 156 AR)

PW8 in turn informed her husband, PW1, of this startling news. They then meet up with the accused at the latter's house on this matter. After this meeting in which they alleged that the accused admitted to the offence, PW8 lodged a police report (exh P6). This led to police investigations which resulted in the accused being charged.

[8] In the case of *Kassim bin Utus v Public Prosecutor* [2005] 6 MLJ 320; [2005] 7 CLJ 273 YA David Wong Dak Wah JC (as His Lordship then was) stated the following:

The brief facts as admitted by the appellant in respect of each case are as follows:

First case: M-83–482–2004-B

On 14 July 2003 at about 3pm at the bushes in the area of Jalan Batu Kitang, Kuching, the appellant threatened a 12 year old female and forced her to undress where he molested the victim by fondling her private parts and forced her to perform an indecent act on him to satisfy his sexual desire. The appellant also threatened to hit her with the helmet if she tried to escape.

Second case: M-83–484–2004-D/E

On 15 May 2003 on 12.30pm, the appellant after taking a female victim, aged six years nine months away to Lorong 11, Jalan Semeba, Kuching threatened her that

he will not send her back home if she did not do as instructed and then forced her to hold and play with his private part. After the incident he took RM10 belonging to the victim.

Third case: M-83–481–2004-E

On 2 July 2002 at about 1730 hrs, complainant ie, Patimah bt Bujang (F), K/P 620205–13–5644 of No 47 Blok B, Kpg Hj Baki Kuching was told by her daughter aged ten years old ('victim') that she had been asked by an unidentified man ('appellant') to show the way to victim's school at SK Hj Baki, Kuching.

The appellant then took her to nearby bushes and forcibly took off the victim's panties and touched her private parts. She shouted for help but the appellant slapped her face twice and threatened to kill her. The victim managed to escape and get help from a kampong man who sent her home.

Fourth case: M-83–479–2004-C

On 6 December 2003 at about 3pm, a female victim aged 11 years old was abducted by the appellant on a motorcycle and taken to bushes at Jalan Batu Kitang where he forced her to perform indecent acts on his private part and thereafter took the victim's gold chain and gold bracelet. After that the victim was taken to Kpg Ajibah Abol's area and forced to walk home.

Fifth case: M-83–480–2004-D/C

On 19 June 2002 at about 8.30am at bushes not far away from Sekolah SMK Kuching High's area, Kuching, the appellant forced a female victim aged ten years old to take off her panties where he performed indecent acts on the victim's private part. After that, the victim cried and ran away from that place.

Sixth case: M-83–483–2004-C

On 24 July 2004 at about 1.40pm, a female victim aged 11 years old was abducted by the appellant using a motorcycle from her grandmother's house at Kampung Lintang. The appellant, pretending to ask the victim to hop on his motorcycle to show him the way to Pangkalan Kpg Lintang, instead took her to bushes near Jalan Batu Kitang where he forced the victim to perform indecent acts on his private part twice. The appellant also threatened the victim that if she did not do as instructed she will not be sent home. The appellant also asked her to take off her underwear and sit on his motorcycle with open legs where the appellant performed indecent acts on her private part. After that, the appellant abandoned her at the side of the road for her to find her way home.

[9] Therefore from the cases above, it can be seen that for an offence under s 377E of the Code, the accused person must have committed an act which is short of rape or sodomy *id est* there was no penetration done on the victim. In the case before me the accused put his hand on the *membrum virile* of the victim and made the victim do the same to him while both of them were fully clothed. This in my view does not amount to gross indecency but amounts to outraging of modesty.

A THE LAW

[10] The Code defines force in s 349 as:

349 Force

B A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling:

C

Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described:

(a) by his own bodily power;

D

(b) by disposing any substance in such a manner that the motion, or change or cessation of motion, takes place without any further act on his part, or on the part of any other person;

(c) by inducing any animal to move, to change its motion, or to cease to move.

E

[11] Whereas criminal force is defined in the Code as:

350 Criminal force

F Whoever intentionally uses force to any person, without that person's consent, in order to cause the committing of any offence, or intending by the use of such force illegally to cause, or knowing it to be likely that by the use of such force he will illegally cause injury, fear, or annoyance to the person to whom the force is used, is said to use criminal force to that other.

G

[12] Lastly assault is defined in the Code as:

351 Assault

Whoever makes any gesture or any preparation, intending or knowing it to be likely H that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation — Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make I those gestures or preparations amount to an assault.

[13] Now s 354 of the Code provides:

354 Assault or use of criminal force to a person with intent to outrage modesty

> Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to ten years or with fine or with whipping or with any two of such punishments.

[14] The ingredients of the offence are:

(a) there must have been assault or use of criminal force on a person; and

(b) such assault or use of criminal force must have been made:

(i) with intention to outrage modesty; or

(ii) with knowledge that the person's modesty was likely to be outraged.

[15] Therefore it must be proven that:

(a) the accused assaulted or used criminal force on the victim; and

(b) that he intended thereby to outrage the victim's modesty; or that he knew it to be likely that he would thereby outrage victim's modesty.

(see *Ratanlal & Dhirajlal's Law of Crimes* (28th Ed), 2018 Vol 2 pp 2411 & 2418)

[16] Ergo based on the finding of facts by the learned SCJ, the appropriate provision of the law applicable is s 354 of the Code and I accordingly found the accused guilty thereunder.

SENTENCE

[17] The learned SCJ in her judgment misdirected herself when she took into account the findings of the internal investigation by the school into the allegations against the accused where it was alleged that the accused had been found to have committed similar acts in the past. This is what the SCJ said at pp 49–51 of the appeal record *Jld* 1:

> Apabila dirujuk dengan Eksibit P14B iaitu laporan kes yang melibatkan pengadu dan Encik Kamarul Azamin (dikatakan sebagai pelaku), hasil siasatan Jawatan kuasa Siasatan yang menyiasat aduan ini mendapati terdapat percanggahan dalam keterangan OKT.
>
> Hasil siasatan menyatakan 'Beliau mengaku ada memanggil pengadu untuk sesi pengajaran tambahan di bilik guru kerana mendapat pengadu agak lemah dalam mata pelajaran tersebut. Beliau mengakui bahawa dia ada memegang dan mengusap-usap peha pengadu, beliau beranggapan perbuatan tersebut telah disalah anggap oleh pengadu. Guru Besar telah menegaskan bahawa guru tidak boleh menyentuh murid. Mangapa beliau masih melakukan? Beliau tidak memberikan sebarang jawapan atas persoalan itu.

A Percanggahan ini adalah amat ketara dan OKT telah menggunakan alasan salah faham oleh SP9 terhadap sentuhan tersebut sedangkan SP9 memang dapat membezakan perbuatan memegang peha dan kemaluan. Ianya adalah dua anggota badan yang berlainan dan dapat dibeza oleh SP9 dengan penuh kepastian.

B Seterusnya Eksibit P14B juga menyatakan 'Beliau telah diberi peringatan tentang kes yang berulang dan memaklumkan kepada beliau akan membawa perkara ini ke pengetahuan Timbalan Pengarah di Pejabat Pendidikan Wilayah Bangsar/Pudu pada hari ini juga. Beliau merayu supaya perkara ini diselesaikan di peringkat sekolah. Guru Besar bertegas untuk membawa perkara ini kepada pihak atasan.

C Mahkamah telah meneliti keterangan OKT dalam pemeriksaan balas:

Q: Setuju pertukaran awak ke SRK TTDI 2 adalah kerana kesalahan tatatertib?

A: Tidak setuju.

Q: Bila berada di SRK TTDI 2 sehingga tahun 2016, awak ada dikenakan tindakan tatatertib di sekolah tersebut dan digantung perkhidmatan sementara?

D A: Ada.

Q: Katakan tindakan tatatertib dan digantung perkhidmatan adalah hampir 2 bulan dari 6.11.2015 sehingga 5.1.2016.

A: Setuju.

E Keterangan 'tentang kes yang berulang' menunjukkan OKT pernah terlibat dengan kes sebegini sebelum ini. Keterangan ini disokong oleh keterangan tindakan tatatertib penggantungan perkhidmatan selama 2 bulan yang dikenakan terhadap OKT. Semua keterangan ini menjurus kepada perbuatan seksual yang dilakukan oleh OKT.

F Demeanour OKT yang merayu supaya kes ini diselesaikan di peringkat sekolah juga adalah amat mencurigakan. Jika benar OKT tidak melakukan perbuatan-perbuatan kelucahan melampau terhadap SP9, OKT tidak perlu merayu untuk kes ini diselesaikan di peringkat sekolah.

G Mahkamah berpendapat OKT adalah seorang saksi yang tidak 'credible', tidak konsisten dan seorang yang tidak boleh dipercayai berdasarkan keterangan-keterangan yang telah dikemukakan sepanjang perbicaraan ini.

[18] The learned SCJ should not have alllowed the school's internal findings to colour her judgment when it came to sentencing the accused. This was H clearly prejudicial to the accused as the internal investigation was not done according to the requirements of a criminal trial. One other unsatisfactory aspect of this trial which I must touch upon is the fact that the learned SCJ took it upon herself to go to the school and make a sketch plan of the teacher's room which was annexed as Annexure A in her judgment (see pp 58–60 of the appeal I record *Jld* 1). This was clearly not her function in an adversarial system such as ours. It would have been much better for the learned SCJ to have instructed the learned deputy public prosecutor to get the investigating officer to do the same. This is to ensure that the accused does not in any way perceive that he was deprived of a fair trial. As the saying goes, justice should not only be done, but

should manifestly and undoubtedly *seem* to be done (not *be seen* which has become a prevalent and pervasive parlance presently).

[19] In the case of *Manokaran & Anor v Public Prosecutor* [1979] 1 MLJ 262, the court held:

> Although he may perhaps have meant well, the Special President was, in my view, over-officious in what he did, and this over-officiousness on his part has regrettably produced certain unfortunate and undesirable offshoots, springing like Athena from the head of Zeus. It is vitally essential if we are to maintain and safeguard that high standard of justice, which is the only haven of safety and strength to which the citizen can steer his threatened barque of liberty, to avoid unnecessary risks of not only causing accused persons to complain but which would also reflect, and reflect adversely, on the administration of justice. I cannot and will not allow or tolerate the taking of any such risks and the concomitant consequences thereof.
>
> However innocent might be the course of events that have transpired in this case, the question still remains of the impression created thereby in the mind of the disinterested man or woman on the Jelutong omnibus — the classic instance of the reasonable person in this country. As Lord Hewart CJ, has pointed out, 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly (seem) to be done' (*The King v Sussex Justices, Ex Parte Mccarthy* [1924] 1 KB 256 at p 259). The original report of that case reads 'but should manifestly and undoubtedly be seen to be done', but, as indicated by Avory J, in *The King v Essex Justices (Sizer and others); Ex Parte Perkins* [1927] 2 KB 475 at p 488 'the words 'be seen' must be a misprint for the word 'seem'.
>
> Further down His Lordship stated:
>
> It is a matter of the gravest public policy that the impartiality of the courts of justice should not be doubted, or that the fairness of a trial should be questioned; otherwise, the only bulwark of the liberty of the subject would be undermined.

[20] With regard to the punishment that was meted out to the accused in this case, looking at the facts in this case and the mitigation put forth by counsel for the accused, and the fact that this was the accused person's first offence, I decided that a fine of ten thousand ringgit for each charge would be sufficient for this case and I so ordered.

Ergo cadit quaestio.

Order accordingly.

Reported by Mohd Kamarul Anwar